“Existential Judicial Review” in Retrospect, “Subversive Jurisprudence” in Prospect. The Polish Constitutional Court Then, Now and … Tomorrow

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Does anybody still remember what has happened to the Polish Constitutional Court (“the Court”) – the first institution to be razed to the ground by the Polish counter-revolution? In the whirlwind times of PIS and an unending list of the fallen institutions, three years might indeed seem like an eternity. The “new court” that has emerged from the rubbles of the rule of law has more than readily embraced a new role of serving its political masters. The transformation of a once-proud and respected institution into a pawn on the political chessboard painfully reminds us of how deep off the cliff Poland has fallen in just three years.

The Scars of Unconstitutional Capture

The ruthlessness with which the Court has been emasculated by the majority, and the persistence with which it has been thwarting the unconstitutional attempts to pack it and disable it, has been told and retold on many occasions. It paints a disturbing story of democracy and institution in distress. 2016 went down in history as fundamental in the institutional history of Polish constitutionalism. What started as “court-packing” soon transformed into an all-out attack on judicial review and checks and balances, and ended with a full-blown constitutional *coup d’état* and the destruction of independent constitutional review in Poland. This attack has been unprecedented in scope, efficiency and intensity. It has never been premised on dissatisfaction with the overall performance or particular acts of the Court, but rather struck at its very *existence*. The Court, a once proud institution and an effective check on the will of the majority, entered 2017 as a shell of its former self with constitutional scars. The latter affect not only the legitimacy of the institution, but also the very constitutionality of the “decisions” rendered by the new court in 2017 and beyond. Five lasting scars transformed the institutional identity of judicial review in Poland. *First*, the Court, as it stands now, is composed of judges that have been elected unconstitutionally and rushed on the bench by the parliamentary majority *per fas et nefas*. At least three of the current judges should have never been sworn in the by the President since there was no vacancy on the bench at the time of their appointment. Sheer and blunt political power prevailed over law. These are “irregular judges” (one of them became Vice-President of the Court since then…). *Second*, despite the unconstitutionality of their mandate, they have not only been sitting on the cases heard by the Court in 2017, but now they have

also validated *ex post facto* their own selection to the Court. *Third*, the President of the Court – Judge J. Przy##bska – has been elected President of the Court, and sworn in by the President of the Republic in *clear violations of applicable rules*. *Fourth*, the statutory scheme of intricate legislative provisions adopted by the new majority in 2016 brought the Court to heel and paralysed its day-to-day functioning (see here and here. Cases are decided *in camera*, and the assignment of cases to individual judges is opaque and depends on the whim and caprice of the unconstitutionally elected President. She tailors the composition of the bench to the political importance of cases. Indeed, J. Kaczy#ski has reasons to be pleased when saying "the Court works as planned" (in reality it is just the opposite: the must-read Report by Helsi#ska Fundacja Praw Cz#owieka shows that the "new court" has bottomed out in 2017). The more important the case from the perspective of political majority, the more likely will it be heard exclusively by judges selected by the new Parliament. The Court decides less and less cases, as the cloud of unconstitutionality hangs over its decisions. These judges have repeatedly shown over the course of 2017 that they see themselves as an extension of the will of the Parliament. And finally, *fifth*, unwanted judgments of the "pre-2017 Court" have been removed from the Court's website. Yes, all this happened in a Member State of the EU.

This begs a question: How should academia respond? We must not pretend that judicial review in Poland is still in place and proceed to legalistic analysis of the judgments rendered by a court as if nothing happened. There is a qualitative difference between 2015/2016 and 2017 that bears on our selection of cases and their treatment. 2015/2016 was constitutionally important with the Court thwarting off the political assault, and building important "existential jurisprudence" centered around the rule of law, independence of the judiciary and separation of powers. 2017 saw a new face of constitutional review. When the Court was finally taken over by the ruling party, Polish politics of resentment entered into a new phase: consolidating the grip on the captured state – media, ordinary courts, Supreme Court, National Court of the Judiciary. The list goes on. The Court's composition was tailored to fulfil a crucial role in the process.

Looking back on 2017, one can see how the capturing of the referees, and having them firmly on the government's side, entails three interconnected processes: i) *weaponizing* judicial review, and using it against the opposition; ii) *instrumentalizing* constitutional review in the process of implementing the political agenda; and finally, iii) judicial *rubber-stamping* of all unconstitutional schemes placed before it by the ruling majority. As a result, the "*existential"* and "symbolic *jurisprudence*" of 2015-2016 has been transformed into "*subversive jurisprudence*" focused on sanctioning the destruction of the last remaining elements of the rule of law in Poland. The term "symbolic" is important: It underscores the importance of standing up for the constitutional essentials in times of constitutional malice and nihilism. As rightly noted by T. Ginsburg: "Only when there is agreement on what constitutes a violation and mutual expectations that citizens will in fact enforce the rules will democracy emerge and be sustained […] in some limited conditions, court decisions can survive as focal points in helping citizens coordinate, and force the autocracy to

liberalize […] a court decision can provide clarity as to what constitutes a violation of the rules by the government. […]".

The efficacy and alacrity with which the facade court acquiesced to its new role as enabler add an important element to the growing doctrine of "populist constitutionalism". It shows that constitutional courts do not have to be rejected. Rather, the new authoritarians will do their best to capture these courts, then defang and co-opt them, all in order to tame the court. What O. Kircheimer called "the element of uncertainty" typical for independent adjudication, is reduced to zero with respect to captured courts.

Of "*Subversive Jurisprudence*". Manifestations

Prior control of the amendment of the Law on assemblies was initiated by the President of the Republic of Poland with respect to a provision on the so-called periodical assemblies (Kp 1/17). "Incidentally", monthly commemorations of the tragic crash of the presidential plane in Smolensk with 89 members of the official delegation and 7 crew members on 10 April 2010 fell within the scope of this very precise definition. They are co-hosted by J. Kaczy#ski – brother of the late President and head of the ruling party – and used to mobilize his supporters. According to the new provision, the President of a local government (pl. "*wojewoda*") may issue consent for 3 consecutive years of exclusive organization of such gatherings, in a given place, or on a given route, on predetermined dates. The privileging of such assemblies in relation to other public gatherings lies in the fact that the organizers of the former enjoy priority in choosing the time and venue, even in relation to assemblies notified earlier. In addition, local authorities are required to issue a decision prohibiting any other meeting to take place, even when they do not violate the law or threaten the life or health of people or large size property. Once the *wojewoda* consents to holding cyclical assemblies, the local authority is obliged to prohibit, within 24 hours of receiving this information, the organization of meetings previously notified, if they are planned at the same time and place. If such a decision is not taken, the *wojewoda* immediately prohibits coinciding gatherings.

The Court gave a short shrift to all constitutional concerns raised by the President (no appeal against the decision of the *wojewoda*, retroactivity). The Court approvingly spoke of the legislator's correct response to "new social circumstances", which required addressing and ordering and classifying "new facts" in the context of the need to ascertain "safety to persons and entities as well as an order". While the judgment lacks logic and force, the most important constitutional take-away is that it changes in a dramatic fashion the relationship between the individual and the state that prevailed in the judgments of the Court until 2015. The new interpretation starts from the subordination of the individual to the state and accepts a radical limitation of the individual's autonomy against encroachments by the majority. The dignitary concept of the rights takes backstage to a communal reading of the rights. Community comes first, individual rights second. The Case was decided with the unconstitutional judges sitting on the case.

The doubts as to the composition of the Court were again raised in Case K 32/16 on the reform of the ordinary courts (proceedings were discontinued as a result of the National Council of the Judiciary withdrawing its application for review). The avowed objective of the government to capture the ordinary courts and the Supreme Court (SC), provide a background for the case decided on 24 October 2017 (case K 3/17). The Constitutional Court (again with the irregular judges sitting on the case) passed a majority decision in which it stated that the resolution on the regulations for the selection of candidates for the post of First President of the SC modifies the law on the SC and the Constitution of the Republic of Poland in an unacceptable manner. It pointed out that the Chairman of the General Assembly of Supreme Court Judges was the appointing authority, and not – as required by the Constitution – the General Assembly of SC Judges. The Court found parts of the provisions governing the procedure unconstitutional. The Court, despite considering the applicant's allegations, did not state that legal acts adopted on the basis of unconstitutional regulations are ineffective. The decision in turn opened the door to "reforming" the allegedly defective SC.

In case K 5/17 all judges deciding the case were carefully handpicked by J. Przy##bska from the judges elected by the new Parliament and among the judges sitting on the cases were two unconstitutional judges. The case merits special attention as an example of a sophisticated scheme to bring down the National Council of the Judiciary (NCJ) under the pretence of legality. It also shows that compromised judicial review delivers on the promise of political justice: minimising uncertainty of the result. The Constitution stipulates that the term of office lasts four years. The Minister of Justice (and President Duda before him) questioned the selection procedure as regards appointees to the Council. They are elected by judicial self-government from among the "elected representatives". According to the Minister of Justice this violated the principle of equality and limited the powers of ordinary judges in the elections. He also challenged the possibility for the term of office of NCJ judges to begin on dates different from that of parliamentarians elected to the Council. The Court ruled that the members of the Council are to be elected as a body, and the four-year term applies to the institution as such, rather than to individual members of the NCJ. The Court also found that the judges' right to vote for their representatives on the NCJ has been violated as well since they cannot vote directly on the members of the NCJ. This is an absurd ruling. Firstly, all judges do have a right to choose their candidates. Every judge has the power to select the electors, and they in turn will choose from their midst the candidates to the Council. Secondly, as for the NCJ's term of office, the reasoning is highly questionable: The Constitution nowhere stipulates that the term of office applies to the Council as a body. However, the logic and legal arguments were of the least of concerns to the judges. Read between the lines: the case was lodged at the Court with the sole purpose of providing "a justification" for a political capture of the NCJ. The political plan was to use the courtroom to rubber-stamp the Minister's claims that the NCJ is unconstitutional and, as such, needs reform. As a result, the Ministry of Justice, now emboldened by the fabricated unconstitutionality, followed through its promise and the new Council has been appointed exclusively by the political branch which itself flies in the face of the Constitution. The Court was used in a legislative scheme to bring down another constitutional body – the Council. And it delivered. Also on

24 October 2017, “the court” decided that three unconstitutional judges were … constitutional after all. Of course, the fake judges were sitting, and thus deciding “in their own case”. In this way, the capture of the Court has now been officially sanctioned and completed.

From “*Subversive jurisprudence*” to Unconstitutional Incitement

The message that comes across the above analysis is bad enough already. However, this is not the lowest point the court-enabler has hit. True bottoming out happened in an obscure case (K 9/16 – the court was again composed of four irregular judges which by now has become a common constitutional practice) and by way of a dissenting opinion of one of the fake judges (and former secret service agent) M. Muszy#ski. The truly remarkable aspect of the case is part of his dissent that reads (my translation): *“I am reminding Adam Bodnar that withdrawing the motions lodged by his Office at the Court without formal change of the legal provisions he questions as unconstitutional, shows that Adam Bodnar falls short of realising the statutory mandate of his office. This is even more so considering the fact that the motives he adduces for such withdrawals are baseless and devoid of any substance. Acting in this way, Adam Bodnar betrays the oath he has taken. As such it constitutes a legal basis for dismissing A. Bodnar”.*

This is no longer weaponising judicial review. It is a direct incitement to unconstitutional action. Polish counter-revolution has reached its final stage.

Waiting for New Existential Jurisprudence of … ordinary courts?

The credibility of constitutional review in Poland has been dealt a deadly blow, and the Constitution has been reduced to mere a fig-leaf. Any future decisions taken by the unconstitutional court with the unconstitutional judges sitting on the cases will be marred by invalidity. The ordinary judges will have a valid claim not to follow these rulings. Should they decide to follow decisions made with the participation of, or by, “fake” judges, their own proceedings will be vitiated by invalidity. The Minister of Justice did not waste time and threatened that ordinary judges who refuse to follow the rulings of the “new” constitutional court staffed by judges loyal to the ruling party will be prosecuted. These are all dramatic consequences entailed by the change in constitutional narrative in Poland. What Poland needs today is the constitutional jurisprudence of ordinary courts that counter the unconstitutional activities and existence of the fake constitutional court. Such “emergency constitutional review” would not simply respond to legal change or to tension between the branches. It would stave off systemic revolution brought about by the unconstitutional capture of institutions and concepts. When constitutional review faces systemic and permanent dysfunction for whatever reasons, resort must be had to emergency review (on the concept see here) by ordinary judges. Emergency judicial review would play an important mobilizing role for pro-democracy and rule of law initiatives. “Calling

a spade a spade" by the judiciary would provide a crucial focal point of societal resistance. Judicial pronouncement in defense of the constitutional order would transform into a symbolic point of reference as a source of loyalty to the oppressed constitutional values. Clarity about the constitutional state of play and constitutional interpretation would focalize the resistance, and move it forward.

Living with, and Resisting the Captured Constitutional Court

The relevant question today is no longer whether emergency review is warranted, but rather whether ordinary judges would be willing to accept their new role. The judges are faced with the most dramatic choice and dilemma here: either to fall in line and bury their heads in the sand by applying the rulings of the "new court" that are vitiated by unconstitutionality, or face up to their own mandate of being bound only "by the statute and the Constitution", and directly apply the constitution (not the suspicious decisions of "the new court") instead. What about the cases in which a decision was taken by the unconstitutional judges, but is in favour of an individual? Should an ordinary judge follow such a decision and protect individual rights? Framing its decision in terms of the Constitution could, at least, create an impression that a judge follows the Constitution, not the decision itself. At times, it might be difficult to discern where the Constitution starts and the invalid decision stops, and *vice versa*. These concerns and challenges go beyond the normative, though. They raise fundamental questions of judicial ethos, and there is no ready-to-use abstract formula here. Each judge in his own consciousness will have to decide how to decide – and be prepared to face the consequences.

2018 and Beyond. Challenges of Courage and Memory

By the end of 2018, the entire Polish judiciary might indeed be captured. Kaczy#ski's dream is finally coming true: a fully subjugated and incapacitated court, at beck and call of its political masters. Yet, the symbolic jurisprudence and the rule of law will never be wiped out entirely as long as judicial review and the Constitution will be reinforced by the ordinary courts, and as long as citizens do not forget about the institution they used to call "Polish Constitutional Court". Once the ordinary judges fail the test, and cave in to the political pressure, and the citizens forget, subversive jurisprudence will indeed reign supreme.

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